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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/083,749	02/25/2002	Richard Charles Jaworski		7505

35647	7590	10/07/2004

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EXAMINER
KERVEROS, JAMES C

ART UNIT	PAPER NUMBER
2133	6

DATE MAILED: 10/07/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE _3_ MONTH(S) FROM
THE MAILING DATE OF THIS COMMUNICATION.
- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed
  after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any
  earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☒ Responsive to communication(s) filed on _20 July 2004_.

2a)☐ This action is **FINAL**.   2b)☒ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is
closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) _1-15_ is/are pending in the application.

    4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) _1-15_ is/are rejected.

7)☒ Claim(s) _1-15_ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☒ The specification is objected to by the Examiner.

10)☒ The drawing(s) filed on _25 February 2002_ is/are: a)☒ accepted or b)☐ objected to by the Examiner.

    Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

    Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

    a)☐ All   b)☐ Some * c)☐ None of:

        1.☐ Certified copies of the priority documents have been received.

        2.☐ Certified copies of the priority documents have been received in Application No. _____.

        3.☐ Copies of the certified copies of the priority documents have been received in this National Stage
application from the International Bureau (PCT Rule 17.2(a)).

    * See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1)☒ Notice of References Cited (PTO-892)

2)☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)

3)☐ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
    Paper No(s)/Mail Date _____.

4)☐ Interview Summary (PTO-413)
    Paper No(s)/Mail Date. _____.

5)☐ Notice of Informal Patent Application (PTO-152)

6)☐ Other: _____.

DETAILED ACTION

1.   Claims 1-15 are pending and are hereby presented for examination, in response

to the present Application filed 8/25/2002.

2.   The petition to make special filed April 20, 2004 and Request for Reconsideration

filed July 20, 2004, is hereby GRANTED.

Specification

3.   The specification is objected to under 37 CFR 1.71 because the specification

lacks an enabling description for claims 1-15, in reference to limitation "Not discarding

packets in the tester with errors" as recited in claim 1, because the specification fails to

clearly describe how not to discard data packets having errors in the tester.

Information Disclosure Statement

4.   The References in support of accompanying Request for Reconsideration of

decision to dismiss petition to make special, filed July 20,2004, fails to comply with 37

CFR 1.98(a)(1), which requires a list of all patents, publications, or other information

submitted for consideration by the Office. It has been placed in the application file, but

the information referred to therein has not been considered.

Claim Objections

5.   Claims 1-15 are objected to because of the following informalities:

The acronym CMTS, recited in claim 1, should be deleted or replaced with the

corresponding detailed description, because an acronym is not given patentable weight.

Appropriate correction is required.

Claim Rejections - 35 USC § 112

6.   The following is a quotation of the first paragraph of 35 U.S.C. 112:

> The specification shall contain a written description of the invention, and of the
> manner and process of making and using it, in such full, clear, concise, and exact
> terms as to enable any person skilled in the art to which it pertains, or with which
> it is most nearly connected, to make and use the same and shall set forth the
> best mode contemplated by the inventor of carrying out his invention.

Claims 1-15 are rejected under 35 U.S.C. 112, first paragraph, as failing to

comply with the enablement requirement. The claim(s) contains subject matter which

was not described in the specification in such a way as to enable one skilled in the art to

which it pertains, or with which it is most nearly connected, to make and/or use the

invention. The specification is not enabling with respect to negative limitation of

"Not discarding packets in the tester with errors" as, recited in claim 1, because the

specification fails to clearly describe how not to discard data packets having errors in

the tester.

The mere absence of a positive recitation is not basis for exclusion. Any claim

containing a negative limitation, which does not have basis in the original disclosure,

should be rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the

written description requirement. Note that a lack of literal basis in the specification for a

negative limitation may not be sufficient to establish a prima facie case for lack of

descriptive support. Ex parte Parks, 30 USPQ2d 1234, 1236 (Bd. Pat. App. & Inter.

1993). See MPEP § 2163 - § 2163.07(b) for a discussion of the written description

requirement of 35 U.S.C. 112, first paragraph. In this case, there is no sufficient support

in the specification to clearly describe the feature of "Not discarding packets", and

therefore the rejection under 35 U.S.C. 112:12, first paragraph, is proper.

7.   The following is a quotation of the second paragraph of 35 U.S.C. 112:

> The specification shall conclude with one or more claims particularly pointing out
> and distinctly claiming the subject matter which the applicant regards as his
> invention.

Claims 1-15 are rejected under 35 U.S.C. 112, second paragraph, as being

indefinite for failing to particularly point out and distinctly claim the subject matter which

applicant regards as the invention.

8.   Claim 1 recites the limitation "at the CMTS" in line 4. There is insufficient

antecedent basis for this limitation in the claim.

9.   Claims 1-15 are rejected under 35 U.S.C. 112, second paragraph, as being

incomplete for omitting essential structural cooperative relationships of elements, such

omission amounting to a gap between the necessary structural connections. See

MPEP § 2172.01. The omitted structural cooperative relationships are: Such as an

essential step before the "Not discarding packets" step and a step before the

"Identifying the packet" step.

Claim Rejections - 35 USC § 102

10.   The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that

form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(e) the invention was described in (1) an application for patent, published under
section 122(b), by another filed in the United States before the invention by the
applicant for patent or (2) a patent granted on an application for patent by
another filed in the United States before the invention by the applicant for patent,
except that an international application filed under the treaty defined in section
351(a) shall have the effects for purposes of this subsection of an application
filed in the United States only if the international application designated the
United States and was published under Article 21(2) of such treaty in the English
language.

Claims 1-15 are rejected under 35 U.S.C. 102(e) as being anticipated by Valk

(US 6643818).

Regarding independent Claim 1, Valk discloses a method for determining the

performance of a network, FIGS. 1-3. For examination purpose, in view of claims

rejection under 35 U.S.C. 112, first and second paragraphs, the Examiner interprets the

feature of "Not discarding packets" to be data packets having errors. Therefore, as best

understood, Valk discloses, a method comprising the steps of:

Transmitting a test packet from a tester bridge chip (190) step 310, though a

network link (144, 146) and Receiving the packet at (140) as shown in FIG. 2, of a

simplified block diagram of a computerized data communication system 100, and as

described in the Summary of the Invention accordingly, regarding a data

communication system comprising a data transmitter device for the transfer of data in

packets having an error code to and from the data transmitter device, a receiver

connected between the processor and the data transmitter device, the receiver having

an error checker to check the error code for a data transmission error of each data

packet.

Discarding packets with errors, in step 340. If there is a transmission error in the

current packet as determined in the inquiry of step 340 or if there is a error in at least

one of the previous n packets, as in step 350, then the data packet is ignored and the

result of the error check is stored in the shift register as in step 360. In either case, the

method loops up to step 320 to accept the next data packet and check the error status

of the new packet.

Returning packets that do not have errors to the tester. If there is no error as in

step 340, the method inquires as in step 350 if there a CRC error occurred during the

transmission of the previous n data packets. If there is no transmission error

associated with the current data packet or any of the previous n data packets, the data

packet is transferred to the packet receiver for further processing and the error status

of that packet is stored in the shift register as in step 370.

Regarding Claim 2, Valk discloses the step of determining the performance of the

upstream portion of the network, as in step 310, where an error code is generated in

the error code generator 195 for each packet of a data stream comprising sequential

data packets.

Regarding Claims 3, 4, Valk discloses a method and apparatus for detecting Lost

Packets and Block Error Rate, when random data is being received which might

indicate that a receiver or a transmitter is open or that random data is otherwise being

transmitted. A stream of data transmitted in packets having an error code associated with each packet is received into a receiver. The receiver has an error code checker to check the error code of each packet to determine if the data packet has been transmitted error-free, See Abstract.

Regarding Claim 5, Valk discloses communication network comprising a cable network, such as network link (144, 146).

Regarding Claims 6, 7, 8, Valk discloses the transmitting step 310, which transmits the signal in the upstream channel, though a network link (144, 146) by transferring data in packets having an error code to and from the data transmitter device 190.

Regarding Claim 9, Valk discloses process to check for errors is Cyclic Redundancy Check (CRC), using error code generator 195 to generate an error code to attach to a data stream, where the error code generator 195 is a 32-bit CRC error code generator, as in step 310.

Regarding Claim 10, Valk discloses the method repeating, as in step 370.

Regarding Claims 11, 12, Valk discloses the test packet (data packets) inherently containing repeating pattern, and where the packets are determined to be test packets by identifying a portion of a repeating test pattern.

Regarding Claim 13, Valk discloses errors in part of the packet, which are ignored if other portions of the packet contain the repeating test pattern,

Regarding Claim 14, Valk discloses the packet size is counted to determine if the packet is the size of a test packet, as in step 370.

Regarding Claim 15, Valk discloses packets, which are not discarded if they contain errors, as in step 360.

Conclusion

11.   Any inquiry concerning this communication or earlier communications from the examiner should be directed to JAMES C KERVEROS whose telephone number is (703) 305-1081. The examiner can normally be reached on 9:00 AM TO 5:00 PM.
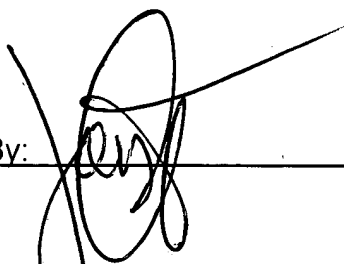
If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Albert Decady can be reached on (703) 305-9595. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

U.S. PATENT OFFICE
Examiner's Fax: (703) 746-4461
Email: james.kerveros@uspto.gov

Date: 29 September 2004
Office Action: Non-Final Rejection

By: _____

JAMES C KERVEROS
Examiner
Art Unit 2133

ALBERT DECADY
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